FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2009-1519
Petitioner	:	A.C. No. 184010
v.	:	
	:	
MOUNTAIN EDGE MINING, INC.	:	Mine: Sweet Birch
Respondent	:	
	:	

DECISION AND ORDER

Appearances: Allen Kelly, Esq. and Michelle Kim, Esq., Secretary of Labor, Office of the Solicitor, representing the Mine Safety and Health Administration;
Sam Madia, Esq. for the Respondent

Before: Judge Moran

Introduction:

At the time of the matters in issue in this proceeding under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), miners at the Sweet Birch Mine were working in particularly adverse conditions. Engaged in retreat mining, they were toiling in a 3 ½ foot mining height environment, making crawling the means of moving about. It was while working under those circumstances that MSHA inspector Brandon Ellison issued a 104(d)(1) Citation on March 9, 2009 ("Citation") and, eight days later, on March 17th, a 104(d)(1) Order ("Order"). The Citation alleged a failure to follow the mine's approved roof control plan, while the Order alleged a failure to conduct an adequate preshift examination. A hearing ensued on February 3, 2011.[1] For the reasons which follow, the Court affirms both violations, finds for each that they were "significant and substantial," the result of high negligence and aggravated conduct, and hence unwarrantable failures, and that the appropriate penalty for the Citation is $24,496.00 and for the Order, $9,122.00, for a total penalty of $33,618.00.

[1]The parties stipulated that the Respondent is an Operator under the Mine Act; that the Mine's operations fall within that Act's jurisdiction, that the proceeding is subject to the Commission's jurisdicition and its judges, that the citation and order involved here were issued by an authorized representative, that such copies of those were authentic and that true copies of them were served on the Respondent. Tr. 8 -9.

Findings of Fact and Conclusions of Law

A. Citation No. 6622239, the roof control violation[2]

Brandon Ellison,[3] is a coal mine inspector for MSHA. At the time in issue here Ellison was conducting a regular inspection, referred to as an "E01." Tr. 24. Referring to his 104(d)(1) Citation, No. 6622239, and GX 3, his notes relating to the issuance of that citation, Ellison stated that on March 9, 2009, he proceeded to the 001 Mechanized Mining Unit, or "MMU," along with mine foreman Terry Walker.[4] Tr. 26. It was at the No. 4 entry where he observed the continuous miner operating under circumstances where there were no test holes outby it. Tr. 27. The roof control plan requires a test hole and also calls for "six-foot torque tension bolts to be placed in a star pattern." Tr. 27. Under the plan, a certified foreman is to examine those test holes prior to mining and then certify that, by listing the date, time and his initials. Tr. 27.

Referring to GX 4, the mine's "safety precautions" which were in effect on March 9, 2009, Ellison stated that, under those provisions, the mine was not in compliance with safety precautions 1 and 4. Safety precaution 1 provides that "[p]rior to retreat mining, supplemental support will be installed in each intersection. The minimum support will be a six-foot fully grouted rebar bolt installed in a star pattern. Such supplemental support may be installed during development." Tr. 28. Safety precaution 4 provides that "prior to retreat mining, a test hole shall be drilled in each intersection to determine any separation in the strata. Such test holes shall be examined by a certified foreman prior to beginning second mining in the pillar(s) immediately inby. The examiner shall place his dates/times/initials at the test hole upon completion of the examination. If any separations are detected, additional support such as longer bolts anchored above the separation, timbers, cribs or crossbars shall be installed prior to retreat mining." Tr. 28-29. Ellison explained that these requirements mean that there must be a test hole at each intersection. [5] Tr. 30. In his view, this failure, by not having the initial support present, contributed to a safety hazard. He explained that

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[2] The applicable provision related to the roof control violation, 30 CFR § 75.220 (a)(1), provides: Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

[3] Government Exhibits 1- 12 were stipulated for admission at the outset of the hearing. Tr. 17-18.

[4] Before doing that he had reviewed various documents on the surface, such as the operator's plans and the preshift examination. Upon completing his imminent danger run, and citing the operator for an alleged violation which is not part of this docket, he traveled to the section feeder, finding another alleged violation, this time for coal accumulations at the No. 5 belt tailpiece. Tr. 27. These other alleged violations play no part in the violations at issue.

[5] The test holes can be drilled during development, in which case they must be left open so that they can be examined. Alternatively, they can be drilled as they retreat, that is, once the development for a panel is completed, they can install the test holes before the retreat mining commences. Tr. 30.

retreat mining naturally weakens the mine roof because that process, by its design, causes the roof to collapse. The extra support, installed in the star pattern, is in the working area where miners would normally stand. By not having the test holes, one doesn't know if the roof is cracked above or if there are any coal or rider seams present. Tr. 31. The importance of this requirement was not theoretical. Ellison noted that in that particular area, only one crosscut outby, this mine did have a roof fall. It was his understanding that occurred due to a "rider seam," which is a "weaker type" of roof strata. Tr. 31.

Ellison was also asked about GX 5, a mine map of the Sweet Birch Mine and GX 5A, which is an accurate representation of a part of GX 5. Tr. 32. Ellison marked on 5A the area where he found the roof conditions he had just described, marking it with an "X."[6] When Ellison found the problem, he was adjacent to the intersection where the miners were conducting the mining cycle. Tr. 98. Thus he affirmed seeing the continuous miner working, immediately inby. Being more particular as to his location, Ellision added that he had documented that he was three breaks inby spad 694. Tr. 99. He did watch the miners load one or two shuttle cars. Tr. 100.

Also pertinent was GX 6, which is a copy of the roof fall incident that Ellison referred to earlier in his testimony. The exhibit, which is an "accident report," stated that the roof fall occurred "[m]idway down to No. 9, area between spad 709 and 713 fell rib to rib, 20 foot long, four foot thick. There seems to be a one to two inch rider seam of coal at the top of the fall. The area is breakered off and will not be [ ] moved."[7] Tr. 35. Per GX 6, that roof fall occurred on March 3, 2009, which was only a week before the inspection in issue here. Tr. 58.

Government Exhibit 12 consists of the preshift and onshift reports for the Sweet Birch Mine and its production reports. Turning to the daily production reports for March 4, 2009, the inspector noted that "major delays" was listed there,[8] providing that "Section area low to 40 to 42 inches. We

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[6] Ellison was confident of his location where he found the problem because he relied upon the mine's survey specs and his notes recorded that he was three breaks inby spad 3940. He also marked this area, encircling it with a green ink marker. Another confirmation of his location, Ellison added that he was in the No. 4 Entry, which he knew to be the belt entry and that the subject area was three breaks from the section "going straight ahead." Tr. 35. After he had checked the section feeder he crawled straight ahead to where the miners were working. Ellison crawled because, as noted, the mining environment is more even arduous than usual at this mine; miners work there within a floor to roof span of about 3 and a half feet. Tr. 35-37.

[7] Ellison marked, again with a green marker, the area of the roof fall on the map. Tr. 36. On Exhibit 5A Ellison marked where mining was being conducted near to the area where he found cited the condition, marking between the large "4" and "6" on that map. Tr. 40. His notes also support the location he identified, as he indicated the spad number and the number of crosscuts inby the condition. Tr. 40.

[8] Ellison believed that production report related to his citation in that it shows that they moved back a few rows and shows the blocks of coal they left behind by that action and that those areas would typically have been mined. Independent of that, the Solicitor introduced the testimony to further establish the inspector's location at the time he issued the citation. Tr. 47.

are unable to see the pressure gauges on the MRS, so federal inspector suggested we pull back two to three rows and then continue pillaring... ." Ellison confirmed that the "inspector" referred to in that report was himself.[9] Tr. 41. Leaving some allowance for down time and other intervening events, Inspector Ellison believed that in the time from the production report of March 4, 2009 to the date of his citation's issuance, the miners could have completed two rows of mining. Tr. 43. It is for that reason that he concluded miners would have been exposed to the hazard of roof falls in the cited area. He noted again that, with the roof fall having occurred in a very nearby area, it is indicative that the roof is weaker in that location. Tr. 44. Three people would, typically, have been exposed: the continuous miner operator, a mobile roof support operator and the shuttle car operator. Significantly, he observed each of these operators at the time he cited the condition. Tr. 44.

Further addressing the cited violation of 30 C.F.R. 75.220(a)(1), Ellison emphasized that retreat mining is more dangerous, as that activity weakens the mine roof and the intent is to have the roof collapse. Tr. 49. Thus the extra precautions are especially important to assure roof support. Adding to that concern, he again noted the weaker roof in the area together with the indication that there was a coal rider seam. Tr. 48.

If a roof fall did occur, Ellison believed that fatal injuries could result. In this regard he noted the massive section of roof that fell nearby. Tr. 49. Additionally, as noted, because this is a "low coal" mine, miners have a diminished opportunity to get out of harms way because, should there be any advance warning, one is relegated to crawling away from such a hazard. Tr. 49. Further, it should be noted that it is not a given that one will even hear a warning of a roof fall, through cracking or popping, as there might not be any such prior indication. Nevertheless, it is obvious that, if such a warning does occur, crawling away from a danger is a slower process.

In terms of his finding that it was "S & S," Ellison viewed it to be a discrete hazard, with a reasonable likelihood to cause an injury, which injury would be serious, including the risk of a fatality. Tr. 50. Because the certification process requires precautions be taken and the frequent checking of conditions, Ellison believed the violation was obvious. For example, he noted the foreman's requirement to make the test hole examination. Each time the miners move from one place to another, the foreman is required to check that hole, making sure it is not cracked, or that there has been a roof shift. Thus, the foreman must continually evaluate the conditions, making sure it is safe before mining starts. Tr. 51.

Ellison also considered the condition to be extensive. As noted, no test hole had been made in the intersection. Tr. 52. The inspector expressed that in his view the problem was extensive. Tr. 52. Another related factor was the length of time the conditions had existed. Relying upon his notes, as reflected at GX 3, there had been eight shuttle cars loads removed from the applicable pillar block. Tr. 53.

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[9] The inspector marked the number "1" at this low area from where he recommended they pull back, marking the new location the miners move to with a "2." The low mining height made it difficult to see the gauges. Tr. 46. It is important to see the gauges to make sure the machine is not overpressurized. One then must either move the gauges to the outside of the machine so they can be viewed, or stop mining the area. Tr. 46.

As Ellison graphically, and credibly, described the circumstances in which he found the violation, he had just finished issuing a citation at section tailpiece when he "heard mining start . . . [s]o I worked my way, eventually crawling up to where they were working at. I watched them load out one or two shuttle cars. While I was on my hands and knees observing that, I was trying to look for the roof bolts to make sure they were in place, and I couldn't see them. So once one of the shuttle cars left the continuous miner, I stopped for a second and crawled over to see if I could find them. I couldn't find them. I looked for the test hole and the section foreman's dates and initials, and couldn't find it. That is when I brought it to [the company rep, Mr. Terry Walker asking about the additional support, the test holes and evidence that the foreman had examined them]." Tr. 55. Though he was asked, Walker did not know why no test holes had been installed. Tr. 61. Instead, Walker apologized for the problem and then had it corrected. [10] Tr. 61.

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[10] Jerry Bias was the mine superintendent at the time in issue. Tr. 229. Bias agreed they were engaged in retreat mining in entries 1 through 8 during March 2009, an area he described as "First off of two north." Tr. 232-234. Regarding the roof control citation, Bias was informed that there was an area that had not been bolted. Tr. 236. He did not view the condition at the time it was cited, but stated that he did later. Tr. 237. Bias felt it was, on balance, better to drill the test holes, not as they were advancing, but rather just before they began the retreat mining. Tr. 238. Referring to Ex 1A, Bias's attorney circled the pillar at spad 812. Before retreat mining the circled pillar, the roof control plan required had to have five bolts, a "five-star pattern, six-foot bolts and a test hole." Tr. 240.

Bias testified as to where they were mining on March 4th, but this was based on his reliance upon production reports from that date. Tr. 244. The mining environment had gotten so low, that the roof supports would not work properly, causing the mine to retreat to a point where they had sufficient clearance. Machines which temporarily support the roof require a minimum of 12 to 18 inches of movement "in case something happens," but Bias informed they only had six inches. Tr. 244. These conditions required them to "pull back at least two rows" leaving those unmined. Tr. 245. On March 6th, the mine was able to produce some coal, based on Bias's review of its production report. Tr. 247. On March 9th, when Ellison's violation of the roof control plan was issued, by the time of its issuance, Bias *speculated* that the mine would have mined a third of the way through two pillars, "at best," as there would have been only an hour of production by that time. Tr. 257. Bias continued, for some time, reviewing his interpretation of the mining activity, and problems they encountered, during the time frame connected with Ellison's alleged violations. Tr. 230- 262. In response to the Court's inquiry, Counsel for Respondent explained that the purpose behind Bias' recounting of the mining activity was to show the areas where Safety Precaution 1 and 4 were needed but that those areas were not the area for which the mine was cited. Tr. 259.

It was Bias' position that "if [they] were mining at spad 718, that intersection [was the only one which] would have had to have been bolted, but that was in No. 5 entry." Tr. 260. Thus, it was Bias' position that Ellison identified an intersection that "was three breaks inby spad 694, . . . which was the one he referenced in that entry, No. 4 entry. That would have been one break outby where we would have been mining that day, and that is not required to be bolted until you mine the block immediately inby." Tr. 261.

With testimony based on production reports, not firsthand knowledge, Bias stated that the mine was actually mining half what was recorded in its production report. Tr. 265. This was because they were misreporting the linear footage. R's Ex. 3, the March 9, 2009 production report, reflects there were "Major Delays." Bias noted that there was an inspector on the section and that

It was Ellison's view that the section foreman, as a member of mine management, should have known about these failures since he was the individual who instructed the crew to start mining. Ellison spoke to both the section foreman and Terry Walker, the mine foreman, about this. Neither of those individuals could locate the required test hole nor any initials. Tr. 57. Further, Ellison considered the violation to be aggravated conduct, beyond ordinary negligence. He stated that the foreman's duty to check for these holes is a "very, very important process in this mining cycle."[11] Tr. 58. With the foreman then instructing his men to commence mining, without checking the hole to see if the hole was even present, let alone not examining it, he placed those miners in danger. Tr. 58. Compouding this failure was the fact that the roof was weaker in this area and, as the Inspector observed, "the company was well aware of [the roof issue]." Tr. 58.

Although Ellison agreed that he did not see any rib rolls outby the cited area, nor did he see other loose material in the cited area, the absence of these conditions must be understood in the context of the retreat mining. Tr. 96. As Ellison explained, "you've got to understand this is where they're drilling. They're actually causing the roof to collapse right in that area because they're mining. So you are going to have sloughage. You're causing the roof to fall naturally. That is how it is designed to work." Tr. 96-97. The inspector's larger point was that one wouldn't be documenting things like "loose or shaggy top," as counsel inquired about, because the whole idea with retreat mining is to have the roof collapse.[12] Tr. 98.

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the shift had to finish star bolting and finish the belt move. Tr. 266. The first shift operates from 7 a.m. to 3 p.m. and then the second shift operates from 3 p.m. to 11 p.m. Tr. 267. Bias maintained that those reports were written backwards, that is, that the what was listed as done on the second shift was actually done on the first shift. Tr. 267. R's Ex. 3, at page 16, notes: "Major delays, first shift, it says down because of an inspector 90 minutes." Tr. 274. Bias admitted that inspector was Ellison. This created an additional problem for Bias's contention, as Ellison testified that he was at the mine during the *first* shift. Tr. 274. Bias had to concede that the *mine's report* showed the belt move occurred during the second shift. Tr. 268. While Bias maintained that the No. 5 entry was actually being mined at that time, when Inspector Ellison's notes were brought to his attention and those notes stated, regarding the issuance of Citation No. 6622238, that a roller was turning in coal accumulation of loose coal, Bias was conflicted, as he agreed that the belt was running at 11:05 a.m. that day. Tr. 269 - 271, GX 3 at p.8. Even the contention by Bias that the mine never moves a belt on the second shift was qualified by himself as he stated that a move on the second shift can occur if "it's an absolute have-to case, which was the case earlier when [the mine] had the low area." Tr. 272. Bias could offer no credible explanation for an accumulation of eight inches in height and stretching for three feet to develop in five minutes. Tr. 271. The best Bias could offer up was that "if they had moved back in an area that had a spill . . . and they didn't clean it up, [the accumulation] would have been there. Tr. 271. This was pure speculation and without any record support. Therefore Bias' theories and speculations are rejected.

[11] Abatement was carried out by installing supplemental support, consisting of six-foot bolts, in the required star pattern. This was followed by drilling the test hole and then that was examined by the section foreman. Tr. 59.

[12] Outby that area, as the inspector acknowledged is a different matter and, if found there, he would note such conditions. In this instance he did not find such problems outby the cited area. Tr.

Further Discussion

The violation of the roof control standard was established.

It is clear that the violation was established; the intersection immediately outby where the continuous miner was operating had neither a test hole nor the required support of 6 foot rebar bolts installed in a star pattern, as required by the roof control plan. The preponderance of the evidence standard was more than met by the Secretary. Thus the Court rejects the contention that the intersection identified by Ellison was not immediately outby the area of retreat mining. Inspector Ellison's testimony was credible and both his location and the area where mining was occurring were established by the reliable evidence.[13]

The special findings were also established. Applying *Mathies*,[14] the violation having been established, the discrete safety hazard, or measure of danger, contributed to by the violation, is plain: roof falls are one of the most basic threats to mine safety. Here, the failure to comply with the minimum requirements of the plan, by not having created the test hole and by failing to install the supplemental support, inherently created a discrete safety hazard. That there was a reasonable likelihood that the hazard contributed to will result in an injury is demonstrated by the plan's requirement for such protection to be installed. Such roof control measures are not required as window dressing; they are included to reduce the odds of a roof fall's occurrence. Thus, Ellison's view that the lack of supplemental support made a roof fall reasonably likely, was fully justified. The last element, that there is a reasonable likelihood that the injury will be of a reasonably serious nature is a given, where roof falls are involved. While that observation is enough, the 20 foot long 4 foot thick roof fall in a nearby area only serves to underscore the demonstrated gravity of this failure to comply with the plan. Even if a miner were to sense, through tangible warning signs, that a roof fall was about to happen, this mine's environment, with its ceiling of only 3 ½ feet, meant that the ability to avoid such an event was compromised by the need to crawl, instead of run, from such a development.

The Court also finds that the violation resulted from high negligence and aggravated conduct

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98.

[13] Accordingly, the Court rejects the Respondent's claim that the belt move occurred during the day shift on March 9th. Instead, as the production report confirms, the belt move occurred during the second shift, that is, between 3 and 11 p.m. That report also references the delay because of Ellison's findings during the first shift. Thus, the Respondent's claim that the production reports were mixed up, that is, reversed, is rejected. Though reliance on Ellison's credible testimony is sufficient in this regard, it is also noted that Bias was not present with the inspector when the violation was noted and that his version of the events was based on his interpretation of the production reports. Further, the Respondent could not even rely upon those reports, as it had to assert that the information in them had been reversed. Ellison also found the rollers of the No. 5 belt turning in an 8 inch high and 3 foot long coal accumulation, a condition that could not have developed in a mere 5 minutes time.

[14] *Secretary of Labor v. Mathies Coal Co*., 6 FMSHRC 1 (January 1984)

and consequently was an unwarrantable failure. In support of this finding, Inspector Ellison's testimony that both of the hazardous conditions he found were obvious, is noted. This is because section foremen are to monitor whether such safety precautions have been taken. Here, the absence of a test hole and the missing supplemental support were obvious and readily ascertainable, had the duties been carried out. In the case of the test hole, those need to be drilled *prior* to the retreat mining cycle. Contrary to that requirement, Ellison determined and the Court finds that the problems continued, unaddressed, through eight shuttle car loads. This meant that the mining crew had been exposed to roof which was not in compliance with the roof control plan for that period of time.[15] In addition to being obvious and continuing until the Inspector discovered the shortcoming, another factor supporting the unwarrantable failure finding is that the section foreman, as a supervisor and therefore a member of management, knew or should have known, of the deficiency. In fact, Inspector Ellison observed the section foreman direct the crew to begin mining, in spite of the minimum roof control requirements not having been carried out. While these findings are sufficient, it is noted again that the situation was further aggravated by the recent and close-by roof fall.

Penalty Determination

The Secretary's original proposed assessment was $12,248.00 for the Citation. In its opening statement, the government announced that it was seeking an increase in its proposed penalty for Citation No. 6622239, involving a violation of 30 C.F.R. 75.220(a)(1), a section 104(d)(1) citation.[16] As discussed *supra*, this involved a failure to follow the approved roof control plan, despite prior notice of the risk of roof falls in the area cited. As the Secretary notes, the violation involved two distinct failures of the roof control plan. The failure of either requirement established the cited violation and the proposed penalty would have $12,248.00 under the penalty policy for either one of the two shortcomings. The Court agrees that as the Secretary could have cited two different provisions, but instead only cited one violation, the enhanced penalty is justified. Tr. 10.

Therefore, it is both rational and reasonable that the penalty should be doubled to $24,496.00 where the record establishes two distinct and independent failures to comply with the minimum requirements of the Plan.[17] The importance of these independent roof control requirements need to be understood in the context of the retreat mining that was occurring here. With retreat mining, collapse of the mine roof is part of the process. This makes the safety requirements

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[15] Ellison estimated the time of exposure before he spotted the problem to have been 15 to 20 minutes.

[16] The parties stipulated that the total proposed penalties will not affect the Respondent's ability to continue in business, that the Violator Data Sheet, per Exhibit A as attached to the Secretary's penalty petition, accurately sets forth the Respondent's size, the total number of assessed violations for the time period therein listed, and the total number of inspection days for such time. Tr. 8-9.

[17] In addition, the Court has independently examined each of the statutory penalty criteria, weighed the gravity and negligence and the other circumstances surrounding this violation, all as developed through the evidentiary record and, apart from the recommendation by the Secretary, concludes that a penalty of $24,496.00 is appropriate for this roof control violation.

particularly important. Test holes are drilled in order to determine if there have been cracks or shifts in the roof's strata. So too, the roof's collapsing creates added pressure on those roof areas that remain intact. It is for this reason that supplemental roof support is required when retreat mining.

The negligence and gravity have already been discussed. Size of business, history of violations, ability to continue in business have likewise been addressed above. While the Respondent demonstrated good faith in abating the violations, once Ellison brought them to the mine's attention, that does not afford a basis for any penalty reduction.

Accordingly, having considered the entire record related to this violation, and the parties' arguments related thereto, the Court concludes that the penalty for the roof control citation should be $24,496.00.

B. Order No. 8082063, the inadequate preshift violation

This Order, issued under Section 104(d)(1) of the Mine Act, cites 30 C.F.R. § 75.360(b)(3). That Section, in relevant part, provides:

> Preshift examination.
>
> (a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. . . .
>
> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and *determine if the air is moving in its proper direction at the following locations*: . . .
>
> (3) Working sections *and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift.* The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas. . . .

30 C.F.R. § 75.360(b)(3) (emphasis added).

Inspector Ellison issued the Order on March 17, 2009. GX 3, and GX 7. Tr. 63-66. As with the prior citation, issued on March 9, 2009, and just discussed, Ellison was visiting the 001 MMU and, following his practice, he first reviewed mine records, such as the preshift and onshift exams, before going underground. Tr. 63. Terry Walker, mine foreman, accompanied Ellison on this day. Before coming upon the condition which prompted the issuance of the subject order, Ellison

wrote up several other alleged violations.[18] Following those actions, the inspector found that the mine's ventilation plan was not being followed in that the bleeder system lacked permanent controls. The air was found to be reversed at entry No. 4 and the bleeder and intake air were mixing, instead of being separated, as required. Also, several stoppings had holes and leaks.[19] Tr. 65. Ellison took a smoke survey and used a chemical smoke to determine the direction of air flow and where it was mixing. Tr. 66. Explaining further, Ellison stated that the No. 5, 6 and 7 entries had ventilation controls which had been removed and this caused bleeder air[20] and intake, that is, "fresh air" to mix before it arrived at the new section where miners were working. Tr. 67.

Per GX 7, pertaining to Citation No. 8082061, also issued on the same date, March 17, 2009, as Order No. 8082063, the inadequate preshift violation being addressed here, Ellison cited the Respondent for not following the approved ventilation plan. Citation No. 8082061 was issued some 35 minutes just prior to the Order presently under discussion, Order No. 8082063. Unlike the escapeway issue cited by Ellison, Citation 8082061 has become a final order and was paid. Tr. 73. Thus, it is considered here. That citation stated that:

> The Approved ventilation plan is not being followed.
> No ventilation control is present at spad # 692 to separate the bleeder system from the intake. A proposed set of double doors were to be installed at this location. This is allowing the bleeder air to mix with the intake air that is feeding the construction section being installed and the electrical installations. The ventilation controls at the mouth of the 1 right 2 right north panel are not in place. No ventilation controls are
>
> present in the #5, #6 and #7, entry's (sic) to separate the bleeder system from the intake. The bleeder system is not functioning properly. The air is reversed coming back out of the gob in the #7 entry.
> The controls that have been installed in this area are not adequate.

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[18] These included an access road that lacked a berm in an area, a finding that a lifeline, at Break 2, didn't come completely out of the mine, and which lacked the required reflective material, and a communication cable that was touching the coal rib. Tr. 64-65. While noted, these problems are not considered at all in determining any of the issues here. It is highlighted here and noted by the Respondent in its Post-Hearing Reply Brief, that, while there was testimony from Inspector Ellison as to another citation he issued, Citation No. 8082062, regarding an alleged failure to establish escapeways, that matter has been contested by the Respondent and was not resolved at the time of the hearing. Accordingly, no part of this decision relies upon that alleged escapeway violation.

[19] The context of these discoveries, where these controls should have been installed, was that the mine had started moving their mining equipment to a new location. Tr. 65-66.

[20] Bleeder air is involved with retreat mining. Once air has passes over coal blocks that have been mined, it is deemed "return" or "bleeder" air. Such air must be dumped into a return entry to the mine's surface. Tr. 67. While Ellison did not find low air or methane at the time of finding the violation, he stated that, if one allows bleeder air in with transit air, over a period of time low oxygen will develop. Tr. 114.

> Several holes are present in the stoppings in the #4, #3 and #2 entry's (sic). This is causing bleeder air to mix with the air in the belt entry and the electrical installations.

GX 7, Citation No. 8082061.[21]

By comparison, the subject Order, Order No. 8082063, asserted:

> An inadequate preshift exam was conducted for the day shift on the construction section where equipment was being removed and installed. Several obvious hazards were found. No ventilation control is present at spad # 692 to separate the bleeder system from the intake. A proposed set of double doors were to be installed at this location. This is allowing the bleeder air mix with the intake air that is feeding the construction section being installed and the electrical installations. The ventilation controls at the mouth of the 1 right 2 right north panel are not in place. No ventilation controls are present in the #5, #6, and #7 entry's (sic) to separate the bleeder system from the intake. The bleeder system is not functioning properly. The air is reversed coming back out of the gob in the #7 entry. The controls that have been installed in this area are not adequate. Several holes are present in the stoppings in the #4, #3, and #2 entry's. (sic). This is causing bleeder air to mix with the air in the belt entry and the non permissible electrical installations. . . . [escapeway allegations omitted]. These hazards are obvious to the most casual observer. Management engaged in aggravated conduct constituting more than ordinary negligence by not adequately recognizing and recording these hazardous conditions. This is an unwarrantable failure to comply with a mandatory standard.

Order No. 8082063

Thus, comparing Citation No. 8082061 with Order No. 8082063, one notes that the two are nearly identical in describing the problem. The key difference is that the Citation holds the Respondent accountable for the ventilation plan violations, while the Order speaks to the Respondent's related failure to note those problems in its preshift examination. The former, paid violation for the ventilation failures, has significant implications for the latter alleged preshift violation.

As Ellison emphasized, the "whole ventilation was really messed up" at the time of his discovery of the problem, as controls were not in place and there were air reversals. Tr. 70.

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[21] That citation's gravity was marked as "significant and substantial" and the negligence as "high," that is, just below the "reckless disregard" categorization.

Thus, the ventilation system was compromised.[22] Nine people were inby this condition, installing equipment, and thereby exposed to the problem. Tr. 71. He listed the violation as "significant and substantial" in that, with ventilation controls out and the air compromised, contaminated air in the intake was present, complicating matters in the event of an emergency. Tr. 71. He found no mitigating factors to be present. [23] Tr. 72.

The inspector explained that, as the preshift indicated there were no hazards, his subsequent findings led him to issue an order for an inadequate examination. Tr. 76. The problems, as identified in Citation 8082061 were obvious, and thus he issued the inadequate examination citation. Here, while the section foreman had examined the area, none of the ventilation problems were documented in then preshift examinations and this led the inspector to issue a violation for the inadequate examination, citing section 75.360(b)(3). Tr. 78-79.

Ellison's point was that once the mine had completed the pillaring, that production had stopped, and the ventilation controls should have been installed. Tr. 81.[24] A total of 9 preshifts had elapsed from the time when these controls, the ventilation controls, should have been in place. Tr. 82. The onshift report for March 17 records the problems identified by Ellison and notes that "[a]ll

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[22] GX 8 is part of the mine's ventilation control plan, which plan was in effect on March 17, 2009. Tr. 68. It includes a schematic, showing where controls are to be located. Tr. 68. The plan requires that the ventilation controls are to be in place prior to installing mining equipment. Tr. 69. Ellison considered this failure to be "high negligence." This was based on the mine's failure to follow its plan, exposing miners to hazardous conditions by allowing intake and return air mixing. Low oxygen would be an issue in such circumstances. Ellison added that if any problem had arisen, as in the case of a mine fire, the intake air would have been compromised.

[23] On cross-examination Ellison was asked about the flow direction of the intake air and in this regard GX 5 was referenced. Ellison marked the No. 8 entry on that map, with an asterisk to identify the mine's intake air. Tr. 125. Referring to the intake air flow in the area the mine was cited, Ellison advised that the air was coming up near the No. 8 entry and then going into the bleeder system. Because stoppings were not in place across the mouth of the panel, the air was coming back out to the panel where the miners were installing equipment. Tr. 127. Ex. 5. Ellison then drew, using a pink ink marker, the air flow he just described, marking it on Ex. 5. Tr. 127. Ellison noted that the map, GX 5, that he was marking was created *after* the time he issued his citation and thus it reflects some ventilation controls *which were not present* when he cited the problem. Tr. 131. He therefore added "Xs" to indicate those controls which, while reflected on GX 5, were not in fact present when he found the violation. Tr. 132. He used a blue asterisk to mark the intake, blue "Xs" to show the controls that were not present when he found the violation but which are nevertheless present on GX 5. He then used a pink marker arrows to show the airflow as he found it.

[24] Ellison explained further the timing for installing controls, stating that once the mining was completed, the ventilation plan required that the controls be installed. Therefore once the equipment was out past where the controls should have been, the controls were to have been built. Tr. 140.

people working on violation."[25] Tr. 83. The Inspector added that he was referring to every type of hazard, air, roof and ribs, when he stated there were obvious hazards. Tr. 109. While other citations he issued at this time involved the conditions he found, this citation pertains to *the examination*, that is, what the examiner *should have* seen. Tr. 111.

Terry Walker, who as previously noted, was the mine foreman at the Sweet Birch Mine in March 2009,[26] identified R's Ex. 4 at 9 as a preshift report for March 15, 2009. Tr. 149-154. That report did not show any low oxygen level present. In fact, Walker noted that the oxygen level was good. Tr. 156-157. Walker stated that the March 16, 2009 shift exam also showed no methane and good oxygen level. Tr. 161. These readings were taken in the No. 8 entry, the intake entry. Tr. 162. R's Ex. 5, an onshift report, similarly showed no methane and good oxygen level. Tr. 167. The other reports showed essentially the same results; all the reports for the entries showed good air and no methane. Tr. 170-177. Those reports also informed that construction was going on. Tr. 181. Walker agreed that a move was taking place at the time Ellison cited the mine. Tr. 183.

Referring to the equipment that was being moved, Walker stated that the miner, that is the machine that cuts the coal, along with the cables and water line associated with it, and three shuttle cars, are among the things that must be moved out to the new section. The roof bolter, and its cable, the power center, all water lines, the beltline, scoop chargers, and all spare parts, needed to be moved out. Tr. 189. Walker stated that these need to be moved *before* one can do any work on "ventilation and stuff in there."[27] Tr. 185.

Thus, it was Counsel for the Respondent's position that there still was equipment in the area they were leaving and that the ventilation requirements cited by the inspector do not become operative until after the equipment has all been removed. Tr. 196. However, these contentions were overtaken by the Respondent's conceding and paying the underlying ventilation violation. Respondent cannot now contend that those cited conditions did not apply, as that would mean it could relitigate the issue here. The only question at this point in time is whether the conceded ventilation

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[25] That onshift report specifically mentioned that the intake needed to be extended, and that "[a]dditional controls [were] being installed." Tr. 83, onshift report.

[26]Walker informed that the mine has since been shut down. Tr. 152.

[27] Walker agreed he was probably not present when the inspector wrote the violation for the inadequate preshift exam. Tr.207. Further, when asked if he discussed the matter with the inspector, he stated he could not remember. Tr. 208. Critically, when asked if he admitted to the inspector that he knew that the ventilation controls had not been established, he answered, "I might have, [then adding] I don't know. I don't remember." Tr. 209. After having Walker mark on the exhibit R 1B where spad 692 was located, the Court inquired of the witness whether equipment was or was not still inby that location at the time the violation was cited. Tr. 218. Walker answered that part of the beltline was still in there and some spare parts, but that was "about all that [was] in there." Tr. 218. Walker maintained that one couldn't have the ventilation controls in place because of the equipment yet to be moved. Tr. 219. Yet, despite that stance, he could not recall protesting about the violation to the inspector when it was issued. Tr. 219. Though he acknowledged that it would have been natural to protest the violation, given his perspective, he was unable to provide a credible reason for that failure to speak up. Tr 219-220. Further, the citation was issued to Walker. Tr. 224.

violation should have been noted in the pre-shift exam. The answer to this is found in the preshift examination standard itself. That standard requires, among other things, that the areas be examined for "hazardous conditions" as well as to "determine if the air is moving in its proper direction."

Although the Respondent contends that there were no hazards to list in its preshift report, the Secretary asserts that the failure to have installed the ventilation controls[28] constitutes such a hazard, as Inspector Ellison's gravity and negligence determinations, relating to the underlying violations, demonstrate that the failure did constitute a hazard. Sec. Br. at 23. The Court agrees.

The Secretary also contends that the Order, No. 8082063, was significant and substantial and constituted an unwarrantable failure. Regarding the "S&S" contention, the Secretary again points to the testimony of the inspector, expressing his view that an accident resulting in a fatality was reasonably likely to occur, as a consequence of the preshift failures. Those failures, that is, the failure to identify the hazards, allowed them to continue without correction. The ventilation shortcomings risked contamination of the intake air, as air from the bleeder was entering that air. Therefore *the risk* of diminished oxygen was present. As Ellison noted, nine miners were installing equipment inby and these shortcomings placed them at risk should a problem develop.[29]

As to the high negligence, aggravated conduct, aspect of the violation, the Secretary notes that the Commission has identified seven factors which may be considered. Sec. Br. at 26, citing *Emery Mining*, 9 FMSHRC 1997 (Dec. 1987) and *Peabody Coal*, 14 FMSHRC 1258, 1261. Among those factors the Secretary points out that the condition was both obvious and extensive. Restated as the obverse, the condition was not latent at all.[30] Further, as agents of mine management, the preshift examiner's failure to record the hazard is imputable to the Respondent.

Establishment of the violation and Penalty Determination

The violation was established and, as the underlying ventilation violation was conceded, no material evidence was presented to demonstrate otherwise. As noted earlier, the cited standard expressly requires an examination for hazardous conditions and it must be determined if air is moving in its proper direction. Section 75.360(b)(3) expressly addresses the requirements, as cited by Inspector Ellison, which the Respondent failed to meet. The final order for the failure to follow the approved ventilation plan, and covering the same deficiencies identified as the basis for the inadequate preshift examination, establishes the shortcomings of the preshift exam. Accordingly, the Respondent is collaterally estopped from contesting the facts which were resolved by its conceding the failure to follow its ventilation plan. For that reason, much of the testimony offered through

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[28] Citing *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (1985), the Secretary notes that the underlying ventilation violation, per Citation No. 8082061, was paid and consequently the hazards identified in that matter have been established.

[29] In this regard, the Secretary cites *Buck Creek Coal,* 17 FMSHRC 8, 15 (Jan. 1995) for the proposition that examination requirements are of "fundamental importance in assuring a safe working environment underground." Sec. Br. at 25.

[30] In terms of the length of time that the hazard continued, the Secretary contends that nine preshift and nine onshift exams failed to record the problem.

Walker was beside the point.

In terms of the special findings of unwarrantability and the violation's significant and substantial characteristic, a few preliminary observations are in order. As noted by Judge Miller in *Big Ridge*, 2011 WL 1621389 (F.M.S.H.R.C.) (March 2011), "the Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners," citing *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997) and *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). Thus, Judge Miller rejected the contention that the lack of an adequate preshift does not create a hazard, quoting from *Enlow* that "[t]he preshift examination is intended to prevent hazardous conditions from developing . . . [t]he preshift examiner must look for all conditions that present a hazard."

So too, Judge Bulluck observed that "[t]he purpose of the pre-shift examination is to 'prevent loss of life and injury' resulting from hazards at mines," citing S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975). The Judge also observed that the "Commission has long recognized that '[t]he preshift examination requirement 'is of fundamental importance in assuring a safe working environment underground,'" citing *Enlow Fork*, 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)).

The Commission has also made clear the inherent importance of the preshift examination for mine safety and health, describing it as "of fundamental importance in assuring a safe working environment underground." 17 FMSHRC 8, at * 15, 1995 WL 29274, *Buck Creek Coal Company, Inc.,* (January 20, 1995). There the Commission reversed an administrative law judge's finding that the failure to conduct a complete preshift examination and record the results before allowing miners to enter the mine was not S&S. As summarized by Judge Zielinski in *ICG Knott County, LLC,* the "Commission held [in *Buck Creek*] that the violation was S&S, even though no hazardous conditions were found upon completion of the examination. . . . Consequently, neither the absence of hazardous conditions, nor the fact that no injuries occurred, bar a finding that a violation was S&S." 2011 WL 840799*,* (February 2011).

It is noted that the Secretary has, at various times, maintained that a failure to conduct an adequate preshift examination is, *per se,* a "significant and substantial"[31] violation. Although it is not necessary to reach such a conclusion here, it may be said that the preshift exam is by its very nature a fundamental and foundational requirement for effective mine safety. Without an adequate preshift examination, the conditions for avoiding a preventable mine accident are greatly diminished. Here, the admitted facts, by virtue of the Respondent's concession to the underlyilng ventilation violation, establish both the inadequacy of the preshift exam and its significant and substantial characteristic. Ellison found the bleeder was not separated from the intake, that ventilation controls

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[31] A violation is "S&S" if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). While fundamental and foundational to effective mine safety, not every failure to conduct an adequate preshift exam would necessarily be "S & S." For example, the failure to include one's initials, assuming all other aspects of the preshift requirements were adhered to, would not seem to justify an "S & S" designation.

were not in place and that several holes were present in stoppings at multiple locations, and all of these deficiencies have been conceded by the Respondent. Ellison testified, and the Court adopts, the inspector's view that those deficiencies established the third and fourth elements of *Mathies*.[32] Accordingly, the Court concludes that the violation was "significant and substantial."

As noted earlier, the underlying ventilation violations described the negligence as "high." Ellison's Order noted that the hazards were "obvious to the most casual observer." With the section foreman having ostensibly examined the area, but failing to note the deficiencies, the unwarrantable finding is sustained.

The Secretary contends that the full penalty, as originally proposed, should be assessed here. The other statutory criteria, such as size, ability to continue in business, and good faith are not altered from the analysis presented regarding the roof control violation. Given its unwarrantable failure and the gravity, as discussed above, the Secretary maintains that the penalty it seeks is fully justified.[33] The Court, finding that the special findings were justified, agrees with the Secretary's penalty proposal and imposes it here.

ORDER

For the reasons set forth above, **Citation No. Citation No. 6622239 is AFFIRMED** and **Order No. 8082063 is AFFIRMED**.

Respondent is **ORDERED** to pay a civil penalty in the amount of $24,496.00 for the Citation and $9,122.00 for the Order, for a total civil penalty of **$33, 618.00**, within 45 days. Upon payment of the penalty, these proceedings are dismissed.

William B. Moran
Administrative Law Judge

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[32] In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set forth that in order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

[33] Although Respondent's Counsel believed that Walker's testimony established mitigating factors, the Secretary countered that, per GX 7, the mine paid the violation for the ventilation issues along with the findings for gravity and negligence, as contained in that citation. The Court, as previously expressed, agrees with the Secretary's perspective; Walker's testimony did not mitigate the penalty.

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